Petition

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No. ____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ORE SEA TRANSPORT,

Petitioner,

—v.—

BURMAH OIL TANKERS, LTD. and
MARLUCIDEZ ARMADORA, S.A.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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THE QUESTION PRESENTED

In international commercial cases governed by the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the United States Arbitration Act may the federal courts relegate parties to multi-party arbitral tribunals created by the courts without regard to the contractual procedure adopted by the parties themselves, or to the Convention, or to the Act, in order to effect consolidation even when the result is fragmentation and proliferation of proceedings?

TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	1
JURISDICTION	1
THE TREATY AND STATUTE INVOLVED	1
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	8
CONCLUSION	17
APPENDIX:	
(i) Opinion of Court of Appeals entered June 3, 1981	1a
(ii) Opinion of District Court entered January 22, 1981	4a

TABLE OF AUTHORITIES

Cases Cited PAGE

Antco Shipping Co., Ltd. v. *Sidermar, S.p.A.*, 417 F.Supp. 207 (S.D.N.Y. 1976), *aff'd mem.*, 553 F.2d 93 (2d Cir. 1977) 9, 12

Atlas Plastering, Inc. v. *Superior Court, County of Alameda*, 72 Cal. App.3d 63, 140 Cal. Rptr. 59 (Ct. App. 1977) 13

Balfour, Guthrie & Co. v. *Commercial Metals Co.*, 93 Wash.2d 199, 607 P.2d 856 (1980) (*en banc*) 13

Bernhardt v. *Polygraphic Co.*, 350 U.S. 198 (1956) 10

Bunge Corp. v. *M/T STOLT HIPPO*, 1980 A.M.C. 2611 (S.D.N.Y. 1979) 12

Compania Espanola de Petroleos, S.A. v. *Nereus Shipping, S.A.*, 527 F.2d 966 (2d Cir. 1975), *cert. denied*, 426 U.S. 936 (1976) 7, 11, 12, 14

Consolidated Pacific Engineering, Inc. v. *Greater Anchorage*, 563 P.2d 252 (Alaska 1977) 13

County of Sullivan v. *Edward L. Nezelek, Inc.*, 42 N.Y.2d 123, 366 N.E.2d 72, 397 N.Y.S.2d 371 (1977). 12

Matter of Czarnikow-Rionda Co., Inc., 512 F.Supp. 1308 (S.D.N.Y. 1981) 12

Matter of Ferrara S.p.A., 441 F.Supp. 778 (S.D.N.Y. 1977), *aff'd mem.*, 580 F.2d 1044 (2d Cir. 1978) 9

J. Brodie & Son, Inc. v. *George A. Fuller Co.*, 16 Mich. App. 137, 167 N.W.2d 886 (Ct. App. 1969) 13

Scherk v. *Alberto-Culver Co.*, 417 U.S. 506 (1974) 10, 16

Stop & Shop Cos., Inc. v. *Gilbane Bldg. Co.*, 364 Mass. 325, 304 N.E.2d 429 (1973) 13

United Steel Workers v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960) 10

PAGE

Vigo S.S. Corp. v. *Marship Corp.*, 26 N.Y.2d 157, 257 N.E.2d 624, 309 N.Y.S.2d 165 (1970), *cert. denied*, 400 U.S. 819 (1970) 12

Treaty and Statutes Cited

United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, T.I.A.S. No. 6997 (New York, June 10, 1958).....1, 6, 7, 8, 9, 10 11, 13, 14, 16

Article II (1) 1, 9
Article V (1)(d).....1-2, 9, 14, 15, 16

United States Arbitration Act, 9 U.S.C.A.....7, 8, 10, 11, 13, 14

Chapter 1, Sec. 2 8
Chapter 1, Sec. 4.....2-3, 11
Chapter 1, Sec. 5 ..... 3, 11

Chapter 2, Sec. 201 (Supp. 1981)..... 2
Chapter 2, Sec. 202 (Supp. 1981)..... 8, 9
Chapter 2, Sec. 203 (Supp. 1981)..... 9
Chapter 2, Sec. 206 (Supp. 1981).....2, 6, 10
Chapter 2, Sec. 208 (Supp. 1981)..... 2

CAL. CIV. PROC. Sec. 1281.3 (Supp.) (West) 13

Foreign Case Cited

Rederi Aktiebolaget Sally v. *S.r.l. Termarea*, Judgment of April 13, 1978, Court of Appeals, Florence, [1979] 4 Y.B. COM. ARB. 294 (International Council for Commercial Arbitration).....14, 16

Other Authority Cited

Annotation, 64 A.L.R. 3d 528 (1977)..... 13

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit entered on June 3, 1981, not officially reported, is printed in the Appendix (1a). The opinion of the United States District Court for the Southern District of New York entered on January 22, 1981, not officially reported, is printed in the Appendix (4a).

JURISDICTION

The judgment of the Court of Appeals was entered on June 3, 1981.

The jurisdiction of this Court to review the judgment is invoked pursuant to 28 U.S.C.Sections 1254(1) and 2101(c).

THE TREATY AND STATUTE INVOLVED

Article II(1) of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, acceded to by the United States in 1970, 21 U.S.T. 2517, T.I.A.S. No. 6997 ("the U.N. Convention") provides:

> "Each Contracting State *shall*[1] recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them. . . ."

Article V(1)(d) of the U.N. Convention provides:

> "Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
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> * * *

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1 Emphasis throughout is ours unless otherwise indicated.

(d) The *composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties,* or, failing such agreement, was not in accordance with the law of the country where the arbitration took place."

Chapter 2 of the United States Arbitration Act, 9 U.S.C.A. (Supp. 1981) provides:

"Section 201. Enforcement of Convention.

'The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, *shall* be enforced in United States courts in accordance with this chapter.'

Section 206. Order to compel arbitration; appointment of arbitrators.

'A court having jurisdiction under this chapter *may direct that arbitration be held in accordance with the agreement* at any place therein provided for, whether that place is within or without the United States. Such court may also *appoint arbitrators in accordance with the provisions of the agreement.*'

Section 208. Chapter 1; residual application.

'Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States.' "

Chapter 1 of the United States Arbitration Act, 9 U.S.C.A. provides:

"Section 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination.

'A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an *order directing that such arbitration proceed in the manner provided for in such agreement* . . . The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration *in accordance with the terms of the agreement* . . . .'

Section 5. Appointment of arbitrators or umpire.

'If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, *such method shall be followed*. . . .' "

STATEMENT OF THE CASE

Petitioner Ore Sea Transport ("OST") is a Panamanian corporation with its principal place of business at Hamburg, Federal Republic of Germany.

Respondent Burmah Oil Tankers, Ltd. ("Burmah") is a Bermuda corporation with its office and principal place of business without the United States.

Respondent Marlucidez Armadora, S.A. ("Marlucidez") is a foreign corporation with its office and principal place of business without the United States, and was the registered owner of the M.S. FILIATRA LEGACY.

By a "Mobiltime" form of "Tanker Time Charter Party" dated May 22, 1973, Burmah chartered the M.S. FILIATRA LEGACY from Marlucidez, "for a term of Ten (10) years, 30

days more or less at Charterer's option"; typed Clause 55 of the Charter provided for arbitration at New York as follows:

> "Any and all differences and disputes of whatsoever nature arising out of this Charter shall be put to arbitration in the City of New York pursuant to the laws relating to arbitration there in force, before a board of *three persons*, consisting of *one arbitrator to be appointed by the Owner* [Marlucidez], *one by the Charterer* [Burmah], *and one by the two so chosen*. The decision of any two of the three on any point or points shall be final. . . ."

By a New York Produce Exchange form of Time Charter dated June 14, 1979, Burmah, as "disponent owners" of the M.S. FILIATRA LEGACY, sublet the Vessel to Petitioner, OST, for a term of "about six (6) months one (1) month more or less Charterer's option"; Clause 17 pertained to arbitration, and provided:

> "That should any dispute arise between Owners [Burmah] and Charterers [OST], the matter in dispute shall be referred to *three persons* at New York, *one to be appointed by each of the parties hereto, and the third by the two so chosen;* their decision or that of any two of them, shall be final, and for the purpose of enforcing any award, this agreement may be made a rule of the Court. The Arbitrators shall be commercial shipping men."

The Vessel entered the service of OST on June 23, 1979, and proceeded to Rotterdam where OST loaded a cargo of crude oil; OST directed Burmah to deliver the cargo at Durban, South Africa; the Vessel arrived off Durban on July 24, 1979, where, disregarding orders from OST, the Vessel refused to enter the port until August 4, 1979; the discharge of cargo at Durban was completed on August 7, 1979, whereupon the Vessel sailed for Saldanha Bay, her next loading port.

As a result of the refusal of the Vessel to effect a timely delivery of her cargo at Durban, OST made claim against Burmah for losses placed at $560,507.09.

The OST-Burmah Arbitration:

Following completion of discharge at Durban, OST invoked the arbitration clause set out in the OST-Burmah Charter by selecting Manfred Arnold as arbitrator and making demand upon Burmah for the appointment of its arbitrator so a third arbitrator could be selected and the matter set down for a hearing. Burmah appointed Hammond L. Cederholm as arbitrator, and, Mr. Arnold and Mr. Cederholm chose Donald Zubrod as third arbitrator.

At the initial hearing held on June 16, 1980, OST argued its cause to the three arbitrators, and submitted supporting exhibits. Burmah notified the panel that it had commenced a separate arbitration with Marlucidez to determine whether Marlucidez had breached its charter party obligations to Burmah by instructing its Vessel not to enter Durban, and that in response Marlucidez had alleged, among other things, that the Rotterdam-Durban voyage was "illegal". Burmah advised that if it was unable to strike the Marlucidez "illegality" defense, it would request a consolidation of the Marlucidez-Burmah, and the OST-Burmah, arbitrations. OST rejected any suggestion of consolidation, and on September 3, 1980, OST requested the arbitrators to schedule a second hearing at which time Burmah would be required to present its defense, if any, to the OST claim.

The Burmah-Marlucidez Arbitration:

Burmah apparently initiated these proceedings on July 31, 1979, for the purpose of determining whether Marlucidez had the right under its Charter with Burmah to prevent the Vessel from entering Durban. Marlucidez justified its action on the grounds, *inter alia*, that the cargo, and the voyage, were possibly "illegal". At the outset, the panel, composed of Hammond L. Cederholm, the arbitrator selected by Burmah,[2]

2 Burmah appointed Mr. Cederholm to the OST-Burmah panel, and to the Marlucidez-Burmah panel. OST has no independent knowledge of the Marlucidez-Burmah proceedings; the description of these proceed-

Eugene E. Murphy, the arbitrator selected by Marlucidez, and Ferdinand Sauer, the arbitrator selected by Messrs. Murphy and Sauer, permitted Marlucidez time to conduct discovery by way of proceedings to be brought by Marlucidez against third-parties in England and in The Bahamas. The continued inability of Marlucidez to support its "illegality" defense eventually caused Burmah to make application for a ruling dismissing the defense as frivolous. On July 20, 1980, a majority of the Marlucidez-Burmah panel denied Burmah's application, and granted Marlucidez additional time to complete discovery.[3]

The Court-ordered Fragmentation:

By September 1980, the OST-Burmah panel was about to set the matter down for a hearing at which Burmah would be called upon to put up a defense to the OST claim, while in the Marlucidez-Burmah arbitration, Marlucidez, by way of various discovery maneuvers, was succeeding in bogging down matters indefinitely. At this point, Burmah petitioned the District Court for an order aborting the OST-Burmah arbitration by forcing OST into a tripartite proceeding with Burmah and Marlucidez before "a consolidated panel of arbitrators consisting of those five arbitrators that are currently appointed to the two panels, namely Mr. Donald E. Zubrod, Mr. Ferdinand E. Sauer, Mr. Hammond L. Cederholm, Mr. Manfred Arnold, and Mr. Eugene Murphy." The filing of the Burmah petition brought both arbitration proceedings to a standstill.

OST opposed Burmah's attempt to consolidate, pointing out, among other things, that the OST-Burmah arbitration was subject to the U.N. Convention; that Chapter 2, Section 206 of

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ings is taken from the dissent of Mr. Cederholm to that panel's ruling of July 20, 1980.

3 As a result of court proceedings commenced in the Supreme Court, New York County (Index No. 21107/80) Marlucidez managed, over Burmah's objection, to obtain an order permitting "discovery in aid of arbitration" in Switzerland by way of letters rogatory. An Order to this effect was signed by the Supreme Court, New York County on February 18, 1981.

the United States Arbitration Act restricted the jurisdiction of the District Court to the appointment of arbitrators in accordance with the provisions of the arbitration agreement; that the OST-Burmah arbitration agreement required a bilateral proceeding before three arbitrators; and, that the parties themselves had already made the appointments in accordance with the method of arbitrator selection set out in their agreement.

By Order dated January 22, 1981, the District Court, on the authority of *Compania Espanola de Petroleos, S.A.* v. *Nereus Shipping, S.A.*, 527 F.2d 966 (2d Cir. 1975), *cert. denied*, 426 U.S. 936 (1976), held it had ". . . broad authority to deal with the question of consolidation and can fashion an arbitration panel as necessary to effect the remedy even though such a consolidated panel is not provided for in the original charter parties" (5a). Exercising this "broad authority" the District Court proceeded to fragment the OST-Burmah arbitration by creating a "satellite tribunal", as follows:

> "Each party is to select one arbitrator, and those three should select two more. That five-person panel should deal with and decide the illegality issue. The other panels can decide, in an appropriate manner and time, the separate issues" (6a).

The Court of Appeals affirmed the order of the District Court. The Court reiterated that the district courts may "mould" the method of arbitrator selection and the number of arbitrators "so as to fit new situations" (2a-3a). According to the Court of Appeals, the U.N. Convention was no impediment since neither enforcement, nor recognition, of an award had been requested, and, in any event, the U.N. Convention "empowers, but does not require, a district court to refuse enforcement of an award rendered in a manner other than strictly within the terms of the agreement to arbitrate. This is an acknowledgment of the role of the law of the arbitral forum, in addition to the agreement of the parties, in determining arbitral procedures" (3a).

Petitioner OST contractually waived its right to a judicial remedy in a court of law only to the extent of a single *bilateral* arbitration of its disputes with Burmah before the *three-man* panel created by Burmah and itself. OST has now been relegated to a judge-created trilateral proceeding before a *five-man* tribunal (of which OST may choose only one member) for a determination of but a portion of its dispute with Burmah. The OST-Burmah bilateral arbitration before the three arbitrators selected in accordance with the OST-Burmah arbitration agreement—the only instrument by which Petitioner consented to forego its right of redress in Court—must mark time, waiting for the proceedings before the court-created five-headed Hydra to be completed. The District Court and the Court of Appeals have thus inflicted upon OST a procedural nightmare in which OST must endure a total of *eight* arbitrators, *three* parties, and *two* separate arbitration proceedings seriatim. All this because when it comes to the method of arbitrator selection, the number of arbitrators, and the parties with whom OST must arbitrate, the Courts below chose their brand of "moulding" over the parties' own arbitration agreement.

REASONS FOR GRANTING THE WRIT

1. Commercial arbitration in the United States can only be driven to chaos by the overt refusal of courts to adhere to the agreement of the parties and thereby also obey the mandates of the U.N. Convention and the United States Arbitration Act. Such chaos will not promote arbitration—it will undermine it.

The OST-Burmah arbitration agreement arises out of a legal relationship considered "commercial", and it is also part of a "maritime contract" within the meaning of Section 2, Title 9 U.S.C.A.; the arbitration agreement is not between citizens of the United States as defined by § 202, Title 9 U.S.C.A., and, therefore, the agreement falls under the U.N. Convention.[4]

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[4] It is "uncontroverted" by Burmah that the arbitration agreements involved here "fall under the Convention within the meaning of 9

Section 202, Title 9 U.S.C.A. *Antco Shipping Co., Ltd.* v. *Sidermar, S.p.A.*, 417 F. Supp. 207, 215 (S.D.N.Y. 1976), *aff'd mem.*, 553 F.2d 93 (2d Cir. 1977); *Matter of Ferrara S.p.A.*, 441 F. Supp. 778 (S.D.N.Y. 1977), *aff'd mem.*, 580 F.2d 1044 (2d Cir. 1978).[5] Actions and proceedings falling under the U.N. Convention ". . . shall be deemed to arise under the laws and treaties of the United States", and the district courts of the United States ". . . shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy." Section 203, Title 9 U.S.C.A.

Article II(1) of the U.N. Convention provides that "[e]ach Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them . . ."; to ensure that this is done, Article V(1)(d) provides that recognition and enforcement of an award "may be refused, at the request of the party against whom it is invoked . . ." where, "[t]he composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place."

The U.N. Convention requires enforcement of the arbitration agreement *as written*. If a court in the forum country sanctions, or compels, an arbitration proceeding before an "arbitral authority", or imposes an "arbitral procedure", "not in accordance with the agreement of the parties", the ensuing award need not be enforced in any of the Contracting States. The law of the arbitral forum is relevant only where the

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U.S.C. § 202." Brief of Respondent Burmah filed in Court of Appeals, p. 7.

5 The affirmances were by way of oral opinion in open court. It is noted at 553 F.2d 93 and 580 F.2d 1044 that the oral opinions were delivered " . . . in the belief that no jurisdictional purpose would be served by a written opinion. An oral opinion or a summary order is not citable as precedent. Local Rule § 0.23."

arbitration agreement itself fails to provide procedures for the selection of the "arbitral authority". The contract prevails over domestic procedural aberrations, and for good reason. As was pointed out in *Bernhardt* v. *Polygraphic Co.*, 350 U.S. 198, 203 (1956), "The nature of the tribunal where suits are tried is an important part of the parcel of rights behind a cause of action." Parties doing business in international commerce, who, by their own volition, forego proceedings in a court of law in favor of commercial arbitration, must have confidence that the contractually determined "arbitral authority", and "arbitral procedure", will be honored in the forum country.

In *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974) this Court stated:

> "The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries."

It was this "uniformity of standards" that was one of the principal purposes of the U.N. Convention, and if international commercial arbitration is to be encouraged, it is to be done by way of strict adherence to the provisions of the arbitration clause. This is not an alien concept. Arbitration is a creature of contract, *United Steel Workers* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960), and when it comes to the selection of the "arbitral authority", *both* chapters of the United States Arbitration Act expressly require judicial obedience to the terms of the agreement:

Section 206, Title 9 U.S.C.A. Ch. 2 reads:

> "A court having jurisdiction under this chapter may direct that arbitration be held *in accordance with the agreement* at any place therein provided for . . . Such court may also appoint arbitrators *in accordance with the provisions of the agreement*."

Section 4, Title 9, U.S.C.A. Ch. 1 reads:

> "A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court . . . for an order directing that such arbitration proceed *in the manner provided for in such agreement*. . . ."

Section 5, Title 9 U.S.C.A. Ch. 1 reads:

> "If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, *such method shall be followed*. . . ."

Ignoring the U.N. Convention, and despite the clear language of the United States Arbitration Act, the Court in *Compania Espanola de Petroleos, S.A.* v. *Nereus Shipping, S.A.*, 527 F.2d 966 (2d Cir. 1975), *cert. denied*, 426 U.S. 936 (1976) stated: "[W]e think the liberal purposes of the Federal Arbitration Act clearly require that this act be interpreted so as to permit and even to encourage the consolidation of arbitration proceedings in proper cases. . . ." 527 F.2d at 975. A judicially contrived consolidation could not be accomplished without the destruction of the arbitral authority provided for by contract, so the Court arrogated to itself the power to do exactly that, holding:

> "[I]f this flexible and desirable remedy [*i.e.*, arbitration] is to encompass consolidation, we hold this must include the essential implementation of the consolidated proceeding by moulding the method of selection and the number of arbitrators so as to fit this new situation. New situations require new remedies. To adhere to the original arbitration agreement which contemplated the appointment of a single arbitrator by each participant and the selection by them of a third arbitrator is no longer possible. . . ." *Id.*

The *Nereus* Court then constructed a five-man arbitration panel for the three parties there involved. *Id.*

Nereus has set a precedent in the Second Circuit whereby the district courts are coming to treat the contracted-for procedures of arbitral agreements as simply a nuisance to be ignored at will whenever they might be supposed to stand in the way of the judge's concept of "arbitral expediency". *See, e.g., Antco Shipping Co., Ltd.* v. *Sidermar, S.p.A.*, 417 F.Supp. 207 (S.D.N.Y. 1976), *aff'd mem.*, 552 F.2d 93 (2d Cir. 1977) (five-man panel ordered although the arbitral agreement provided for three arbitrators); *Bunge Corp.* v. *M/T STOLT HIPPO*, 1980 A.M.C. 2611, 2617 (S.D.N.Y. 1979) ("The court is empowered to create a new framework for arbitration . . . including the method of selection and the number of arbitrators, when consolidation renders old procedures impracticable"); *Matter of Czarnikow-Rionda Co., Inc.*, 512 F.Supp. 1308, 1309 (S.D.N.Y. 1981) ("the District Judge can mold the method of selection and the number of arbitrators to implement the consolidated proceedings").

New York is a center for commercial arbitration, and the above is but a small sampling of cases in the Southern District of New York, most of which are not officially reported, where parties to international commercial agreements containing arbitration clauses are being deprived of their contractually agreed forum and ordered to participate in proceedings before court-created tribunals.[6]

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6 Among the states, although court-created arbitration before "consolidated" panels has been sanctioned in New York, *see Vigo S.S. Corp.* v. *Marship Corp.*, 26 N.Y.2d 157, 257 N.E.2d 624, 309 N.Y.S.2d 165 (1970), *cert. denied*, 400 U.S. 819 (1970), its highest court has recently come to question the wisdom of this practice. *County of Sullivan* v. *Edward L. Nezelek, Inc.*, 42 N.Y.2d 123, 128, 366 N.E.2d 72, 75, 397 N.Y.S.2d 371, 374 (1977) ("We recognize the fundamental principle that the resolution of disputes by arbitration is grounded in agreement of the parties. In that perspective, on principle it would have seemed preferable to premise orders directing consolidation in arbitration on express agreement of the parties to that effect. . . ."). Other states have *rejected* the notion that the courts may force

In the case presently before this Court, such judicial overreaching has attained a new height, with the direst consequences for economy and simplicity of legal effort. Here, the District Court has ordered, not a "consolidation", but a *fragmentation,* so that a judge-created five-man "satellite tribunal" can hear and determine a portion of an arbitrable dispute. Upon completion of this judicially-born "spin-off" from two separate arbitration proceedings, *which had been in progress for well over one year at the time of the District Court's order,* the parties will be free to retreat to their respective separate arbitration proceedings to argue about what the "satellite tribunal" actually decided, and to pick up the pieces dropped in September of 1980, when Burmah filed its "consolidation" petition. The mere possibility of such a procedural imbroglio should cause any serious businessman to shun commercial arbitration in the United States.

Unless this Court promptly arrests the growth of this judicial repeal of the U.N. Convention and of the United States Arbitration Act, participants in international commerce agreeing to settle disputes by arbitration in the United States will face the constant risk, as happened to OST, of being summarily ordered to submit to a series of unbargained-for quasi-arbitral proceedings under procedures bearing little resemblance to those they contracted for in their arbitration agreements. Such judicial abuse of international arbitral agreements is contrary to the goal of the U.N. Convention; it does violence to the express terms of *both* chapters of the United States Arbitration

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multiparty arbitration by way of judicial dictate. *J. Brodie & Son, Inc.* v. *George A. Fuller Co.*, 16 Mich. App. 137, 142, 167 N.W.2d 886, 888 (Ct.App.1969); *Stop & Shop Cos., Inc.* v. *Gilbane Bldg. Co.*, 364 Mass. 325, 330, 304 N.E.2d 429, 432 (1973); *Consolidated Pacific Engineering, Inc.* v. *Greater Anchorage*, 563 P.2d 252, 255 (Alaska 1977); *Balfour, Guthrie & Co.* v. *Commercial Metals Co.*, 93 Wash. 2d 199, 200, 607 P.2d 856, 857 (1980) (*en banc*); *Atlas Plastering, Inc.* v. *Super. Court, County of Alameda*, 72 Cal.App.3d 63, 72, 140 Cal.Rptr. 59, 63 (Ct.App. 1977) (In 1978, California amended its Arbitration Statute to permit consolidation. CAL. CIV. PROC. § 1281.3 (Supp.) (West)); *see generally,* Annotation, 64 A.L.R.3d 528 (1977).

Act; it is detrimental to the integrity of the arbitral process; it is, as illustrated by this very case, uneconomic and hopelessly tangled; and, if chaos is to be avoided, it must be stopped.

2. The overt refusal of courts to obey the U.N. Convention and the United States Arbitration Act negates uniform observation of agreements to arbitrate and jeopardizes enforcement of American awards abroad.

Article V(1)(d) of the U.N. Convention provides that recognition and enforcement of an award may be refused where "the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties." The federal courts that are now forcing "consolidated" proceedings upon parties are constrained to concede that they are doing so in derogation of the arbitral agreement. *See Compania Espanola de Petroleos, S.A.* v. *Nereus Shipping, S.A., supra.* So far as petitioner knows, the judiciary of no other Contracting State has sanctioned such wanton emasculation of arbitration agreements falling under the U.N. Convention, and it is evident that awards issued by such court-created tribunals will not be entitled to recognition and enforcement under the U.N. Convention outside the United States. Precedents for such non-recognition abroad already exist.

Thus, in *Rederi Aktiebolaget Sally* v. *S.r.l. Termarea,* Judgment of April 13, 1978, Court of Appeals, Florence, [1979] 4 Y.B. COM. ARB. 294 (International Council for Commercial Arbitration), Sally had chartered its vessel to Termarea under an "EXXONVOY 1969" form providing for arbitration before three arbitrators at London. A dispute arose. Sally and Termarea each appointed an arbitrator, but the two so chosen did not select a third. The two arbitrators awarded Sally $24,000. Termarea refused to pay. Sally, invoking the U.N. Convention, sought enforcement of the London award in Italy. Citing Article V(1)(d) of the U.N. Convention, the Italian Court refused enforcement, stating:

"According to Art. V, para. 1 under *d*, of the New York Convention, implemented in Italy by Law No. 62 of January 10, 1968 (the applicability of the above Convention to the present case is self-evident), the recognition of a foreign arbitration award is to be refused where 'the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place'. From the arbitral award which is the subject of the present suit it results that same was issued on the basis of clause 24 of a charter party stipulated between the parties on March 11, 1975. Said clause provided for the arbitral award to be issued by three persons, two of them respectively appointed by the parties, and the third to be appointed by the other two. From same award it also results that, on the contrary, it was issued only by the two arbitrators appointed by the parties. As a consequence, in accordance with the above mentioned provision, *the award cannot be declared enforceable, since the arbitral tribunal was not in conformity with the one provided for by clause 24 of the charter party.* In this connection the claimant invokes Sect. 9 para. 1, of the English Arbitration Act 1950, which, according to the wording quoted by him, provides as follows:

'Where an arbitration agreement provides that the reference shall be to three arbitrators, one to be appointed by each party and the third to be appointed by the two appointed by the parties, the agreement shall have effect as if it provided for the appointment of an umpire, and not for the appointment of a third arbitrator, by the two arbitrators appointed by the parties.'

However, even if we should accept as proven said provision of the English law, same is insufficient to make enforceable in Italy the arbitral award which is the subject of the present suit. In the first place, in fact, we must bear

> in mind that, in accordance with the above quoted Article of the New York Convention, the conformity of the composition of the arbitral tribunal with the law of the country where the arbitration takes place (England, in this case) must be observed for the enforcement of the award only if the parties have not provided for a different composition of the arbitral tribunal. In this case, the charter party provided that the arbitral tribunal was to be made up of three arbitrators.
>
> In the second place, we must point out, however, that the Arbitration Act mentions one arbitrator (Umpire). As a consequence, even if English law were applicable, the composition of the arbitral tribunal which rendered the award in question constitutes a ground of refusal of enforcement of the present award, since it was clearly rendered by two arbitrators."

American awards rendered by court-created tribunals in derogation of arbitral agreements falling under the U.N. Convention cannot expect any different treatment abroad than that given to the London award by the Italian court in *Rederi Aktiebolaget Sally* v. *S.r.l. Termarea, supra.* In the plain language of Article V(1)(d), such awards are not entitled to enforcement abroad.

The goal of the U.N. Convention and the principal purpose of American adoption and implementation of it ". . . was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are to be enforced in the signatory countries." *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974). If that goal is to be achieved, this Court must now bring to a halt the practice of judicial abuse of arbitral agreements.

CONCLUSION

For the reasons set forth above, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the third day of June, one thousand nine hundred and eighty-one.

PRESENT:

HON. STERRY R. WATERMAN,
HON. WILLIAM H. TIMBERS,
Circuit Judges,

HON. MORRIS E. LASKER,
District Judge,
Sitting by Designation.

81-7118

In the Matter of the Arbitration

—between—

BURMAH OIL TANKERS, LTD.,

Petitioner,

—and—

MARLUCIDEZ ARMADORA S.A.,

—and—

ORE SEA TRANSPORT,

Respondents.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is *affirmed* substantially for the reasons stated in Judge Griesa's opinion dated January 22, 1981.

This case arises out of the shipment of a cargo of crude oil by the M/S FILIATRA LEGACY to Durban, South Africa, in July, 1979. The vessel was operated by its owner, Marlucidez Armadora, chartered to appellee, and subchartered to appellant.

Both charter parties provided for arbitration in New York by a three-person panel. The disputes between Marlucidez, appellant, and appellee arose from a delay when the vessel refused to enter the port of Durban to deliver the cargo on behalf of appellant. A separate arbitration was commenced under each of the two charter parties.

The instant appeal is from the district court's order granting appellee's motion to compel a partial consolidation of the two arbitrations for the determination of one issue, on the grounds that this issue involves common questions of law and fact in the two arbitrations and that the potential prejudice to appellee from inconsistent determinations is great.

The district court had discretion to order consolidation of arbitrations to avoid potential prejudice to the parties. *Compania Espanola de Petroleos, S.A.* v. *Nereus Shipping, S.A.*, 527 F.2d 966, 975 (2d Cir. 1975) (Medina, *J.*), *cert. denied*, 426 U.S. 936 (1976). In directing a consolidated proceeding, the district court may "[mould] the method of selection and the

number of arbitrators so as to fit this new situation." *Id.* We hold that the district court did not abuse its discretion in this case. Its determination was reasonable that the potentially irremediable prejudice to appellee from inconsistent determinations was not outweighed by countervailing considerations. The contrary has not been demonstrated on appeal.

The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, T.I.A.S. No. 6997, as implemented by the Federal Arbitration Act, 9 U.S.C. §§ 201 *et seq.* (1976), does not require a contrary result. This is not a proceeding in which enforcement or recognition has been requested. Moreover, because appellee waived objections to enforcement of any future award on the ground that it was not rendered in accordance with the intent of the parties to the arbitration agreements, this Convention will not apply to such an award. Assuming *arguendo* that the Convention did apply to this case, it still would not deprive the district court of its discretion to order consolidation. The Convention empowers, but does not require, a district court to refuse enforcement of an award rendered in a manner other than strictly within the terms of the agreement to arbitrate. This is an acknowledgement of the role of the law of the arbitral forum, in addition to the agreement of the parties, in determining arbitral procedures.

STERRY R. WATERMAN

Sterry R. Waterman
United States Circuit Judge

WILLIAM H. TIMBERS

William H. Timbers
United States Circuit Judge

MORRIS E. LASKER

Morris E. Lasker
United States District Judge
Sitting by Designation

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

80 Civ. 5354

OPINION

In the Matter of the Arbitration

—between—

BURMAH OIL TANKERS, LTD.,

Petitioner,

—and—

MARLUCIDEZ ARMADORA S.A.,

—and—

ORE SEA TRANSPORT,

Respondents.

GRIESA, *J.*

I.

Petitioner has brought this motion to consolidate two arbitrations in which it is involved. The motion is granted and a partial consolidation is ordered.

On May 22, 1973 petitioner time chartered the M/S Filiatra Legacy from respondent Marlucidez Armadora ("Marlucidez") for ten years. This charter party ("head charter") provided that the ship could "be employed in any part of the World, excluding . . . places prohibited . . . to vessels of Liberian . . . Registry."

Petitioner then sub-chartered the ship to respondent Ore Sea Transport ("OST") for six months. Pursuant to OST's instructions, the vessel loaded a cargo of oil. Eventually, the vessel was directed to discharge the cargo in the port of Durban, South Africa.

During the time the vessel was scheduled to arrive at South Africa, Liberia announced a prohibition against Liberian flag vessels from carrying cargo to and from South Africa. Marlucidez thus took the position that the vessel was not required to enter ports in South Africa. As a result, petitioner called for arbitration under the head charter.

Marlucidez interposed three defenses in the arbitration. One related to the trading restrictions in the head charter; the second related to whether Durban was a safe port; the third related to an underlying "illegality" of the carriage of the oil cargo.

About one month after the start of the head charter arbitration, respondent OST invoked the arbitration clause of the sub-charter. OST claims that petitioner is liable for damages arising from the delay associated with delivering the cargo.

Petitioner attempted to have the head charter arbitration panel rule that evidence of illegality of the shipping contract was irrelevant to the charter arbitration. On July 22, 1980 the panel ruled that it would receive evidence on the illegality question. Petitioner then requested respondent OST to consent to consolidation of the two arbitrations. OST refused by letter dated September 3, 1980. Petitioner then brought this motion to compel consolidation.

II.

No party denies that the court has power to order consolidation. The motion is addressed to the discretion of the court. The court has broad authority to deal with the question of consolidation and can fashion an arbitration panel as necessary to effect the remedy even though such a consolidated panel is not provided for in the original charter parties. *Compania*

Espanola de Pet. v. Nereus Ship., 527 F.2d 966, 975 (2d Cir. 1975), *cert. denied*, 426 U.S. 936 (1976).

I rule that there should be a consolidated hearing on the illegality question. The principal reason is the possible prejudice from inconsistent rulings if the illegality question is arbitrated by two panels.

Contrary to the arguments of respondents, petitioner has neither waived, nor unduly delayed the making of, the request for partial consolidation.

Each party is to select one arbitrator, and those three should select two more. That five-person panel should deal with and decide the illegality issue. The other panels can decide, in an appropriate manner and time, the separate issues.

So ordered.

THOMAS P. GRIESA

Thomas P. Griesa
U.S.D.J.

Dated: New York, New York
January 22, 1981

Opposition

Office - Supreme Court
FILED
SEP 25 1981
R L. STEVAS
CLERK

No. 81-385

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

ORE SEA TRANSPORT,

Petitioner,

—v.—

BURMAH OIL TANKERS, LTD. and
MARLUCIDEZ ARMADORA, S.A.,

Respondents.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Court of Appeals err in concluding that under the unique facts of the present matter neither the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards nor the United States Arbitration Act deprive the District Court of its well-recognized discretion to order a consolidated arbitration proceeding to avoid potential prejudice to the parties?

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED i

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 3

1. The Decision Below Is Not in Conflict With Any Decision of This Court or of Any Other Circuit Court of Appeals 3

2. The Finding Below Is Limited to Its Own Facts .. 7

CONCLUSION 10

TABLE OF AUTHORITIES

CASES:	PAGE
Compania Espanola de Petroleos, S.A. v. *Nereus Shipping, S.A.*, 527 F.2d 966 (2d Cir. 1975), *cert. denied*, 426 U.S. 936 (1976)	3, 7
County of Sullivan v. *Edward L. Nezelek, Inc.*, 42 N.Y.2d 123, 397 N.Y.S.2d 371, 366 N.E.2d 72 (1977).	6-7
Matter of Doughboy Ind. (Pantasote Co.), 17 App.Div.2d 216, 233 N.Y.S.2d 488 (1962)	6n
Rederi Aktiebolaget Sally v. *S.r.l. Termarea*, Judgment of April 13, 1978, Court of Appeals, Florence [1979] 4 Y.B. Com. Arb. 294 (International Council for Commercial Arbitration)	7, 8
Tarmarea, S.R.L. v. *Rederiaktiebolaget Sally*, [1979] 2 All E.R. 989, 123 Sol J. 537	9
STATUTES:	
Federal Arbitration Act, 9 U.S.C., Sections 4 and 5	1
9 U.S.C. § 201	4n
9 U.S.C. § 206	4n
OTHER AUTHORITIES:	
European Convention on International Commercial Arbitration of 1961, 484 U.N.T.S. 364	5n
RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 218, Comment b	6n
Sultan, U.N. Arbitration Convention and U.S. Policy, 53 AM. J. INT'L L. 807 (1959)	5n
U.N. Doc. E/CONF. 26/SR. 17 (1958)	4n
U.N. Doc. E/2822, A II	5n
U.N. Doc. E/2840	5n
4 WILLISTON, *CONTRACTS* § 615 (3d ed. 1961)	6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-385

ORE SEA TRANSPORT,

Petitioner,

—v.—

BURMAH OIL TANKERS, LTD. and
MARLUCIDEZ ARMADORA, S.A.,

Respondents.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent, Burmah Oil Tankers, Ltd. ("Respondent Burmah") respectfully submits this brief in opposition to the petition of Ore Sea Transport ("Petitioner OST") for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

STATEMENT OF THE CASE

This is a petition for certiorari seeking review of the affirmance of an order granting an application under the Federal Arbitration Act, 9 U.S.C., Sections 4 and 5. Respondent Burmah petitioned for an order directing a consolidated arbitration with Marlucidez Armadora S.A. ("Owner") and Petitioner OST, and an order was entered by the District Court granting a partial consolidation. Petitioner OST appealed. The Court of Appeals affirmed the order of the District Court.

This case arises out of the carriage of a cargo of crude oil by the M/S FILLIATRA LEGACY (the "vessel") from Rotterdam to Durban, South Africa in July, 1979. The vessel was operated by Owner, chartered to Respondent Burmah, and subchartered to Petitioner OST, by whom or on whose behalf the vessel was ordered to South Africa.

The disputes between the parties arise from a delay that occurred when the Master of the vessel wrongfully refused to enter Durban, South Africa, to deliver a cargo of oil as he had been ordered to do. Two arbitrations were commenced.

The first arbitration was by Respondent Burmah against Owner under the charter party between them ("the head charter arbitration") and it was initiated in late July, 1979, to try to compel the Owner to finish the voyage. After two hearings had been held in the head charter arbitration and several more weeks had gone by, Petitioner OST then commenced an arbitration against Respondent Burmah ("the subcharter arbitration") on August 24, 1979, for similar relief.

Several non-evidentiary hearings were then held in the head charter arbitration, at which time it became increasingly apparent that the principal defense for the Owner was founded on allegations of "illegality" committed not by Respondent Burmah, but rather by Petitioner OST or its privies. [The Owner had also alleged other defenses that had no bearing on the dispute between Petitioner OST and Respondent Burmah.] Respondent Burmah tried to persuade the head charter arbitration panel that such allegations of illegality committed by Petitioner OST did not constitute a defense to Respondent Burmah's claim, but the arbitrators refused to make an interim ruling to that effect and they allowed the Owner more time to uncover evidence of "illegality," which the Owner is now pursuing through letters rogatory.

Meantime, prior to the filing of the Petition to Compel Consolidated Arbitration herein, the subcharter arbitration had had only one pro-forma hearing without witnesses on June 16, 1980. Respondent Burmah thereupon promptly sought

consolidation of the two arbitration panels so that the subcharter arbitration panel could hear, and rule upon, whatever evidence the Owner was able to uncover about "illegality". Although the charter parties are different in form, the "illegality" question arises without reference to specific charter party clauses but rather as a result of the application of general contract law to both charter parties.

All of the parties have, through their respective charter parties, agreed to arbitrate disputes in New York. The "illegality" dispute among the parties involves identical questions of law and fact. It is the position of Respondent Burmah that the District Court's order for a partially consolidated arbitration, whereby the "illegality" question was to be arbitrated before a five-man panel of arbitrators to be appointed by the parties specifically for that purpose, was properly ordered and affirmed.

REASONS FOR DENYING THE WRIT

1. The Decision Below is not in Conflict with any Decision of this Court or of any other Circuit Court of Appeals.

Petitioner OST admits that it is settled law in the Second Circuit that consolidated arbitration may be ordered in spite of stipulations in the arbitration agreement concerning the number of arbitrators. *Compania Espanola de Petroleos, S.A.* v. *Nereus Shipping, S.A.*, 527 F.2d 966 (2d Cir. 1975), *cert. denied*, 426 U.S. 936 (1976) [hereinafter cited as *Compania Espanola*]. Furthermore, it is not disputed by OST in its petition before this Court that *Compania Espanola* was correctly held to be the controlling precedent in the decision below. Rather, Petitioner OST attacks the *Compania Espanola* decision and its progeny, and claims that these decisions, in ordering consolidated arbitration, evidence "the growth of [a] judicial repeal" of both the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the Convention") and the United States Arbitration Act.

Petitioner OST argues that Article V of the Convention, dealing with enforcement of awards, somehow has a bearing on the instant proceedings, where no award is yet in issue. Petitioner OST then goes on to argue that the decision below does violence to the "agreement" between Petitioner OST and Respondent Burmah, contrary to alleged prohibitions in Article V of the Convention. None of those propositions has the least merit, as will now be shown.

Article V of the Convention deals with the limited circumstances in which a court may refuse confirmation of an award. Petitioner OST correctly notes that confirmation may be refused if an award was rendered by an "arbitral authority" whose composition was not in accordance with the "agreement of the parties."

The drafting history of the Convention indicates that Article V(1) (d) does not mean, however, that the Convention supersedes all authority that the national courts would otherwise have over the conduct of the arbitration.[1] Moreover, there is no palpable support for the proposition that Congress, when it implemented the Convention, intended to diminish the power of the Court to supervise arbitration proceedings in cases subject to the Convention.[2]

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1 The Italian delegate to the Convention, who was a member of the Working Party that proposed the draft ultimately adopted as the Convention, explained that Article V(1)(d) "had been inserted on the understanding that the parties enjoyed discretion only to the extent that they could select the national law applicable in the matter [and] should not be interpreted to mean that the parties could agree to disregard all national laws and determine some special procedure applicable to their case alone." U.N. Doc. E/CONF. 26/SR. 17 (1958), p. 10.

2 In the implementing legislation, 9 U.S.C. §§ 201, 206, Congress merely restated the power of the Court already found in 9 U.S.C. § 4 to order the parties to arbitration "in accordance with the terms of the agreement." (In 9 U.S.C. § 206, "provisions" is substituted for "terms".) There is no indication in the legislative history that Congress meant for the Court to have any different role in a Convention case than in a non-Covention case, except that in a Convention case, the Court was empowered to order arbitration abroad.

The language in Article V(1)(d) was designed to prevent a losing party at arbitration from being able to raise previously unlitigated technical arguments, about arbitral procedure, before some foreign tribunal that was trying to confirm the award. It is clear that the intent was only of a remedial nature to ease the burden of the winning party when confirming an award. In other words, Article V is a shield from collateral attack in the enforcement forum.

Petitioner OST attempts to catapult that simple and salutary intention into a blanket prohibition of Court supervision over the arbitration process, in accordance with the law of the forum, prior to the rendering of the award. Such a sweeping interpretation cannot be adopted without the clearest possible language in the Convention.

Moreover, Article V(1)(e) clearly contemplates that court supervision over the arbitral forum will remain unaffected, since enforcement of an award may be refused if an award itself has been "set aside or suspended by a competent authority of the country in which . . . that award was made." No attempt is made in the Convention to prescribe the standards under which a competent authority may set aside or suspend an award. *A fortiori,* the Convention has nothing to say about court supervision of the *conduct* of the proceedings prior to the rendering of the award.[3]

The only restriction in the entire Convention, governing the conduct of courts in the pre-enforcement stage, is contained in Article II(3), where courts are obligated to "refer the parties to arbitration." (N.B. That provision does not say that the court

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3 Indeed, it was recognized by the U.N. Secretary General, at the outset of the Convention proceedings, that such questions would need to be the subject of a separate convention. U.N. Doc. E/2840, para. 5 and U.N. Doc.E/2822, A II, p.3, quoted in Sultan, U.N. Arbitration Convention and U.S. Policy, 53 AM. J. INT'L L. 807, 823 (1959). The European nations have adopted a subsequent convention along those lines—The European Convention on International Commercial Arbitration of 1961, 484 U.N.T.S. 364, which the United States has not ratified.

in the forum must refer the parties to arbitration in accordance with the narrowest possible interpretation of the arbitration clause, but only that it must "refer the parties to arbitration.") It thus remains open to the court to apply all of the forum's rules of law governing the conduct of arbitration, when referring the parties to arbitration. The parties must be presumed to have agreed to those rules when stipulating for arbitration in a particular forum. (See discussion *infra.*)

Thus, Article V simply has no bearing on the current proceeding. Article V deals only with award enforcement proceedings. This is not a proceeding to enforce an award.

Careful scrutiny should also be given to Petitioner OST's contention that the decision below is not in accordance with the "agreement of the parties." That begs the question of what the parties really agreed.

An agreement consists of whatever the parties expressed, plus whatever the governing law implies in the agreement. 4 WILLISTON, *CONTRACTS* § 615 (3d ed. 1961). The arbitration agreement between Respondent Burmah and Petitioner OST stipulated that the arbitration was to be held in New York. An agreement specifying a place of arbitration is an implied choice of law clause.[4] Thus, New York law governs the arbitration agreement, and Petitioner OST necessarily agreed to whatever New York law implies in the arbitration agreement.

At the time Petitioner OST signed its arbitration agreement, it was settled law in New York that "parties signing an agreement to arbitrate must be held to do so in contemplation of the announced authority of the courts in proper cases to direct consolidation. If it is now desired to avoid the possibility of consolidation, appropriate provisions to preclude or limit consolidation can be drafted for inclusion in the particular arbitration agreement." *County of Sullivan* v. *Edward L.*

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4 *Matter of Doughboy Ind. (1962) (Pantasote Co.),* 17 App. Div. 2d 216, 221, 233 N.Y.S.2d 488, 494; RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 218, Comment b.

Nezelek, Inc., 42 N.Y.2d 123, 128, 397 N.Y.S.2d 371, 374, 366 N.E.2d 72 (1977). There was no stipulation in the agreement between Petitioner OST and Respondent Burmah precluding or limiting consolidation. Therefore, consent to consolidation must be implied in the agreement, and so it did no violence to the agreement or to the Convention for the District Court to have ordered consolidation.

This Honorable Court denied a writ of certiorari in the case of *Compania Espanola, supra.* The foregoing arguments demonstrate that certiorari was quite properly denied in that case, as it should be in the present case. No decision of this Honorable Court has addressed the question of consolidated arbitration, and so there can be no conflict with prior decisions of this Honorable Court.

Although the Petitioner OST cites several state court cases construing their own state arbitration statutes, no United States Court of Appeals decision is cited as contrary to the proposition that the United States District Courts have discretion to order consolidated arbitration under the United States Arbitration Act. Thus, in addition to there being no conflict with prior decisions of this Honorable Court, there is no conflict among the Circuit Courts of Appeals.

2. The Finding Below is Limited to its own Facts.

Petitioner OST argues that this court should not sanction an "arbitral authority" whose award cannot be confirmed. Relying on an isolated Italian case, *Rederi Aktiebolaget Sally* v. *S.r.l. Termarea,* Judgment of April 13, 1978, Court of Appeals, Florence [1979] 4 Y.B. Com. Arb. 294 (International Council for Commercial Arbitration), Petitioner OST declares that in ordering consolidated arbitration proceedings, the federal courts jeopardize enforcement of American awards abroad. Petitioner OST is not correct, however, that the ultimate award in this matter could not be confirmed because of the District Court's consolidation order.

First of all, the ultimate award in this matter will be rendered by the three-man panel that Petitioner OST seeks, thanks to the perspicacity of the District Court's "satellite" arbitration invention. Secondly, if OST wins that award, obviously it will not be invoking procedural "irregularities" to oppose confirmation. Respondent Burmah has explicitly waived any objection to confirmation of the ultimate award on the grounds that the "satellite" arbitration was not in accordance with the agreement of the parties.[5] Thus, if Petitioner OST ultimately wins, the award will not fail confirmation because of the decision below.

On the other hand, if Petitioner OST ultimately loses its case in the award, it will not be seeking confirmation of the award,[6] and so once again the award will not fail confirmation because of the decision below. Thus, no matter what the outcome, the award in this matter will never be in jeopardy because of the decision below, and the *Rederi Aktiebolaget Sally* scenario, *supra,* cannot arise. That is the end of the concern about technicalities expressed in the Convention. Viewed in that light, it can be seen that Petitioner OST is trying to use Article V of the Convention not as a shield from the collateral attack of an award, but rather as a sword to try to cut off Respondent Burmah's legitimate rights under U.S. and New York law. That is not the purpose of the Convention.

Furthermore, in *Rederi Aktiebolaget Sally* v. *S.r.l. Termarea, supra,* the Italian court draws at least part of the strength of its conclusion from its interpretation of the English statutes providing for the appointment of an umpire. As set out in Petitioner OST's petition herein, the Italian court concluded that "even if English law were applicable, the composition of

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5 Respondent Burmah's waiver of any such objection provided the basis for the Court of Appeals' finding that the Convention does not apply to this case. Petition for a Writ of Certiorari at 3a.

6 Similarly, Respondent Burmah would not seek confirmation of an award ruling against Petitioner OST's case, since Respondent Burmah is seeking no affirmative relief against Petitioner OST.

the arbitral tribunal which rendered the award in question constitutes a ground of refusal of enforcement of the present award, since it was clearly rendered by two arbitrators."[7]

In a subsequent enforcement action between the same parties brought in England, the English court held that the London arbitration award *was* enforceable under English law. *Tarmarea, S.R.L.* v. *Rederiaktiebolaget Sally*, [1979] 2 All E.R. 989, 123 Sol J. 537. Clearly, an Italian court is less competent than an English court to construe an English statute, and to the extent the decision of the Italian court is predicated on its construction of the English statutes, the decision of the Italian court is wrong.

To summarize, Petitioner OST argues that the arbitration agreement's stipulation for three arbitrators, under Article V of the Convention, becomes an absolute requirement preventing the District Court from ordering consolidation. That proposition is based on an unwarranted extrapolation of Article V and tries to convert a provision limiting permissible defenses to an award into an implied limitation on the announced power of the District Court to supervise arbitration proceedings.

Moreover, the District Court's order of a "satellite" proceeding guarantees that the Petitioner OST will receive an award from the three-man panel that Petitioner OST seeks, and consent to such a procedure is implied by law in the arbitration agreement that Petitioner OST signed. Finally, the ultimate award necessarily cannot fail to be confirmed because of the decision below, as was demonstrated previously.

Respondent Burmah respectfully submits that there is nothing which warrants this Honorable Court's review of the Court of Appeals' conclusion concerning the unique situation present in this case.

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7 Petition for a Writ of Certiorari at 16.

CONCLUSION

In light of the above, Respondent Burmah respectfully submits that the petition herein should be denied.

Dated: New York, New York
September 24, 1981

Respectfully submitted,

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